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No. 82-2157

In the Supreme Court of the United States

OCTOBER TERM, 1983

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., PETITIONERS

v.

CENTRAL TRANSPORT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, permits the trustees of a multiemployer employee benefit plan to audit records of an employer participating in the plan to verify that the employer is making contributions on behalf of all employees for whom they are due.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are multiemployer employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Multiemployer Act), 29 U.S.C. 1001 *et seq.* Petitioners provide health, welfare and pension benefits to certain persons whose employers are engaged in interstate trucking. Respondents are 16 interstate trucking companies. Each of the petitioner benefit plans was created by a trust agreement entered into by multiemployer associations to which respondents belong and various local affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1] By the terms of the

[1] The trust agreements covering the pension fund and the health and welfare fund are identical in all material respects. References hereinafter are to the provisions of the Pension Fund trust agreement, which is reproduced at Pet. App. A43-A49.

National Master Freight Agreement, a collective bargaining agreement to which the union and respondents are signatories, respondents are required to make weekly contributions to petitioners for each employee "covered by the agreement." An employee is "covered," irrespective of union membership, if he or she is employed in a particular job classification described in the collective bargaining agreement.[2] Respondents have expressly agreed to be bound by the trust agreements governing the petitioner funds. Pet. App. A1-A5, A16.

The trust agreements require each participating employer to make "continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement" (Art. III, Sec. 1 (Pet. App. A44)). The agreements establish boards of trustees to administer the Funds and require the trustees "to demand and collect the contributions of the Employers to the Fund" and to "take such steps, including the institution and prosecution of * * * any legal proceedings as the[y] * * * in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of [employer] contributions * * * owed to the Trust Fund" (Art. III, Sec. 4 (Pet. App. A45)). In order to facilitate the trustees' performance of their collection and enforcement responsibilities, Article III, Section 5 of the trust agreements provides (Pet. App. A46):

> Each Employer shall promptly furnish to the Trustees, upon reasonable demand the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files * * *.

In addition, each employer is required to supply (*ibid.*):

> such other information as the Trustees may reasonably require in connection with the administration of the Trust.

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[2] Respondents allege that 60% of their employees are not covered.

Article III, Section 5 provides as well that (*ibid.* (emphasis omitted)):

> The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.[3]

The trustees have the power to construe the provisions of the trust agreements; any construction adopted by the trustees in good faith is binding on employers, the union and employees (Art. IV, Sec. 17 (Pet. App. A27, A48)).[4] Finally, the trustees are empowered "[t]o do all acts, *whether or not expressly authorized herein*, which the Trustees may deem necessary or proper for the protection of the property held hereunder" (Art. IV, Sec. 14(e) (emphasis added) (Pet. App. A27, A45, A47)). See generally *Schneider Moving & Storage Co.* v. *Robbins*, No. 82-1860 (Apr. 18, 1984), slip op. 4-5.[5]

2. In late 1979, petitioners contacted respondents to arrange a "periodic review[] of participating employer contributions for the benefit of Plan Participants and their Beneficiaries," including a "[d]etermination of eligible Plan Participants covered by Collective Bargaining Agreements" (Pet. App. A6-A7). During the course of this audit, in February and March 1980, respondents furnished petitioners' audit staff with some of the information they requested. Respondents provided payroll registers for those employees whom respondents deemed cov-

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[3] Employee information disclosed to the trustees is required to be held in confidence except where disclosure is authorized by a court, required by law, or necessary to determine benefits due (Art. III, Sec. 5 (Pet. App. A46)).

[4] By the terms of the collective bargaining agreement and implementing agreements providing for respondents' participation in the Pension and Health and Welfare Funds, respondents agreed to be bound by all actions of the Funds' trustees (Pet. App. A3-A4).

[5] The trust agreements involved in this case are the same ones interpreted by the Court in *Schneider Moving & Storage Co.*

ered by the collective bargaining agreement. In addition, respondents produced insurance exception listings, which are documents prepared monthly that list the individuals and time periods for which respondents acknowledge liability to make contributions to the Trust Funds. *Id.* at A85-A86.

Based on the limited information provided, the Funds' auditors discovered substantial reporting and contribution deficiencies, including respondents' failure to pay sums owed to the Funds totalling in excess of $268,000.[6] The auditors also discovered four instances in which respondents had made contributions for an individual not listed on the various documents that purportedly contained the names of all covered employees. Pet. App. A7, A83-A84, A87. Despite petitioners' request, however, respondents refused to provide tax forms and complete payroll ledgers that included information regarding employees who respondents claimed were not covered (*id.* at A7, A86). At respondents' direction, the auditors left respondents' premises on March 28, 1980 without completing their audit (*id.* at A7, A88).

3. Petitioners commenced this action in the United States District Court for the Eastern District of Michigan pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a), and Section 502 of ERISA, 29 U.S.C. 1132, alleging that respondents had failed accurately to report, and to remit benefit fund contributions for, all employees covered by the collective bargaining agreement (Pet. App. A1-A2). The relief sought included an injunction directing respondents to allow a complete audit of their payroll records in order to enable the trustees to verify that respondents had correctly reported and made contributions in respect of all covered employees. Petitioners maintained that, without

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[6] Petitioners' auditors found that respondents had failed promptly to report newly-hired employees, had reported premature termination dates for departing employees, had failed to contribute for employees who worked part of a week during a strike, and had failed to contribute for employees who were on sick leave (Pet. App. A83).

such an independent audit, they would be unable to insure the financial integrity of the benefit funds or to fulfill their fiduciary obligations to the plans' participants and their beneficiaries. Pet. App. A2. The district court held (*id.* at A8-A14) that petitioners had both a contractual right under various provisions of the trust agreements and a statutory obligation under ERISA to audit respondents' payroll records "to independently verify the status and duties of all individuals employed by [respondents] in order to insure that proper benefit contribution payments are being made" (*id.* at A3).

4. The court of appeals reversed (Pet. App. A15-A34). The court initially held (*id.* at A18-A20) that ERISA does not itself afford petitioners any authority to audit respondents' records "to independently verify whether any given employee is covered by the collective bargaining agreements" (*id.* at A19). The court of appeals acknowledged that ERISA imposes broad fiduciary duties on benefit plan trustees. 29 U.S.C. 1104. The court reasoned, however, that because the Act also specifies that fiduciaries must act "solely in the interest of [plan] participants and beneficiaries," and must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" the Act (Pet. App. A19 (quoting 29 U.S.C. 1104(a)(1)), the

> provisions of ERISA require reference to the terms of the collective bargaining agreements and the trust agreements to determine who are the participants and beneficiaries to whom statutorily imposed duties are owed and to the terms of the trust agreements to determine what the precise nature of those duties are.

Pet. App. A19-A20.

The court of appeals held, moreover, that the trust agreements did not authorize the trustees to undertake the audit contemplated, either. The court of appeals initially concluded that the trustees' right under Article III,

Section 5 to demand pertinent information on *employees* did not extend to persons other than those covered by the benefit plans (Pet. App. A20-A26). Additional language in Article III, Section 5, that requires an employer to furnish other information reasonably required by the trustees, and to produce pertinent records for the trustees' examination, was also dismissed as insufficient to afford the trustees the audit authority claimed (Pet. App. A26). The court reasoned that this language " 'can only refer to information reasonably required as to "covered" employees additional to the records specifically listed' " (*ibid.*, quoting *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616, 619 (8th Cir. 1981)).

The court of appeals did recognize a contractual basis for the trustees' exercise of a tightly circumscribed auditing authority extending beyond records on persons conceded by an employer to be covered by the employee benefit plan (Pet. App. A27-A31). The court inferred that the trustees' duty to collect contributions owed by employers (see Art. IV, Sec. 2 (Pet. App. A47)) and their power to protect trust assets by taking acts not otherwise explicitly authorized (see Art. IV, Sec. 14(e) (Pet. App. A47)) required the trustees to "ensure that contributions to the Funds correlate with the disbursement of benefits from them" (*id.* at A29). But the right recognized was "confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been * * * classified * * * as a covered employee" (*ibid.*).

The court of appeals explained that the trustees' authority under the trust agreements is "limited * * * by ERISA" (Pet. App. A27). The court extracted this limiting principle in part from the trustees' statutory duties to administer the Funds exclusively in the interest of participants and other beneficiaries (*id.* at A29). The court of appeals appears, however, to have relied primarily upon the view that it would be "arbitrary and

capricious"—and thus an imprudent expenditure of plan assets inconsistent with a fiduciary's obligations under ERISA—to undertake an audit designed to ferret out underpayments, absent reasonable cause to suspect that an employer has failed to make required payments in the case of a particular employee (*id.* at A29-A30).[7]

Applying the limited auditing right it recognized, the court of appeals concluded that petitioners were entitled to review only respondents' records covering the four individuals as to whom respondents had made trust fund contributions without listing the individuals as covered (along with the records covering those employees respondents conceded to be covered). Any broader audit was deemed "outside of [the trustees'] statutorily and contractually imposed duties, express or implied, as a matter of law" (Pet. App. A32).

DISCUSSION

The decision of the court of appeals erroneously infers from the Employee Retirement Income Security Act of 1974 a limiting principle that will substantially restrict the ability of employee benefit plan trustees to fulfill their fiduciary duty to assure that all sums owed to such plans are properly remitted. The decision below also assigns a cramped interpretation to Article III, Section 5 of the trust agreements that is directly contrary to the reading that this Court recently gave to the same language in these agreements in *Schneider Moving & Storage Co.* v.

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[7] The court of appeals also concluded that limiting the trustees' auditing authority to instances in which there is cause to believe that required contributions have not been made for an identified employee was consistent with traditional labor relations principles (Pet. App. A30-A31). The court observed that "[c]overage under the terms of a collective bargaining agreement has traditionally been within the province of the employer and union" (*id.* at A30). The court of appeals believed that limiting the trustees' audit authority "preserves the privacy [*sic*] and integrity of the grievance and arbitration provisions agreed to by [respondents] and the Union as a means of resolving questions of employee coverage" (*id.* at A31).

Robbins, No. 82-1860 (Apr. 18, 1984). Because of the practical importance of the issues presented and the broad adverse consequences likely to flow from the decision below, we believe that further review is warranted. Because the court of appeals did not have the benefit of this Court's decision in *Schneider Moving & Storage Co.*, however, the Court may prefer to vacate the judgment of the court of appeals and remand this case for reconsideration in light of that decision.

1. a. After 10 years of study of the operation and failings of private employee pension and welfare benefit plans, Congress enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* ERISA was designed to redress major deficiencies in plan functioning found to implicate "the continued well-being and security of millions of employees and their dependents" by establishing "minimum standards * * * assuring the equitable character of such plans and their financial soundness" (29 U.S.C. 1001(a)). Congress's objective was simply to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). To achieve this end Congress required that "all assets of an employee benefit plan shall be held in trust" (29 U.S.C. 1103(a)). See S. Rep. 93-127, 93d Cong., 1st Sess. 29-30 (1973). In order "to make as certain as possible that pension fund assets would be adequate" to pay benefits due, Congress also "prescribed standards of conduct for plan" fiduciaries. *Nachman Corp.*, 446 U.S. at 375.

The fundamental standards of conduct prescribed by Congress are set forth in Section 404 of ERISA, 29 U.S.C. 1104. Congress required employee benefit plan fiduciaries to discharge their duties with respect to the plan "solely in the interest of the participants and beneficiaries" and with the "care, skill, prudence, and diligence" that a prudent person "familiar with such mat-

ters" would employ if acting under similar circumstances. 29 U.S.C. 1104(a)(1). Congress also required fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as [they] are consistent with [ERISA]." 29 U.S.C. 1104 (a)(1)(D).

In outlining the fiduciaries' responsibilities, Congress deliberately declined to enumerate the powers and duties of trustees, choosing instead to invoke the common law of trusts: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts" (S. Rep. 93-127, *supra*, at 29). See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332-333 (1981). It was Congress's intent that principles of fiduciary conduct adopted from existing trust law be interpreted and applied "bearing in mind the special nature and purpose of employee benefit plans." H.R. Rep. 93-1280, 93d Cong., 2d Sess. 302 (1974). Thus, the trustees' statutory obligations to act in a prudent manner and with utmost fidelity to the interests of participants and beneficiaries encompass many subsidiary duties and powers recognized in the common law.

Specifically, the law of trusts recognizes a number of fiduciary duties that necessarily arise from the trust relationship. Trustees have a common law duty to take necessary steps to preserve and maintain trust assets. Bogert, *Trusts and Trustees* § 582 (rev. 2d ed. 1980). Acts traditionally deemed necessary to preserve trust assets include identifying the trust assets, holding the settlor to his obligation to deliver the assets, and asserting control over the assets. *Id.* § 583, at 348-350, 355-356. Trustees also have a duty to investigate the identity of beneficiaries for the purpose of notifying them of gifts made for their benefit. *Id.* § 583, at 348; see *Rosen* v. *Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir.), cert. denied, 454 U.S. 989 (1981).

Moreover, under the law of trusts made applicable to employee benefit plans by ERISA, a fiduciary's express

powers, defined by the instrument creating the trust, are augmented by powers implied from the terms and purposes of the trust. Bogert, *supra*, § 551, at 3, 41. Among those implied powers is the trustee's authority to "use the ordinary and natural means" for obtaining a result dictated by the settlor. *Id.* § 551, at 41; *Restatement (Second) of Trusts* § 186 (1959).

b. An audit of a participating employer's payroll records is an ordinary and natural means for employee benefit plan trustees to fulfill their statutory duty to act with fidelity to the interests of plan participants and beneficiaries and their common law duties to collect the trust assets and identify the beneficiaries. Plainly the trustees of an employee benefit plan have an obligation to safeguard the interests of unidentified, but covered, employees for whom no contributions are being made. In addition, in a multiemployer plan, the trustees must protect the interests of all participants and employers by guarding against underfunding resulting from deficiencies in the contributions of any particular employer. In order to carry out these duties in a manner consistent with the statutory standard of prudence, trustees must develop effective strategies for determining whether employers' contributions make provision for all "covered" employees. Thus, trustees must develop "reasonable, diligent and systematic methods for the review of employer contribution accounts [including] field audits." Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976). Accord, *Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 E.B.C. 1726, 1732 (D.D.C. 1982).

Contrary to the view of the court of appeals (Pet. App. A19, A29), checking an employer's records to verify that required contributions have been made for all covered employees, whether or not identified as such by the employer, is entirely consistent with the statutory directive that fiduciaries act solely in the interest of plan participants and beneficiaries. Such an audit necessarily encompasses review of payroll records of persons who

are not acknowledged by the employer to be covered, and will as a practical matter often entail examination of records of some persons who are not in fact covered. Still, the essential purpose of such an audit is to protect the interests of plan participants—both those who have erroneously been excluded by the employer in making contributions, and those who have been accurately identified as covered but whose interests are threatened by underfunding of the plan because of an employer's failure to make contributions in respect of all covered persons.

Equally incorrect is the court of appeals' categorical judgment (Pet. App. A29-A30) that a prudent fiduciary is prohibited from undertaking an audit extending beyond the records of those conceded to be covered and those other identifiable individuals the trustees have reasonable cause to believe are covered. This limitation deprives the trustees' auditing authority of the ability to uncover previously unsuspected delinquencies in contributions. It would reward concealment of such delinquencies and would, contrary to fundamental precepts of fiduciary responsibility, force trustees to rely heavily upon the probity and accuracy of determinations made by contributing employers. Cf. 29 U.S.C. 1110. The court of appeals' decision thus is irreconcilable with Congress's desire to employ the common law of trusts "to make as certain as possible that pension fund assets would be adequate" to pay benefits due (*Nachman Corp.*, 446 U.S. at 375). It constrains plan trustees from employing reasonable means that are well-suited and necessary to the performance of their fiduciary duties.[8]

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[8] Generally accepted accounting standards confirm that trustees of a multiemployer employee benefit plan are not to be restricted in the performance of their obligation to identify and collect all assets owed to the plan. See generally Arthur Young & Co. Am. Br. 8-12. For instance, completion of an independent audit of such a benefit plan requires that the auditor be assured of the accuracy of data on the number and identity of participants, and may require that an employer's records be examined to enable the

The tension between the critical role that Congress expected plan fiduciaries to play in assuring the financial soundness of benefit plans and the restricted scope of the auditing authority recognized by the court of appeals is exacerbated by the court's niggardly application of the "reasonable cause" standard it announced (see pages 6-7, *supra*). Surely, when an audit limited to payroll records of concededly covered employees uncovers significant employer contribution deficiencies, prudence dictates that further auditing be undertaken to verify whether contributions are being made for all covered employees. Even if particularized suspicion were required, petitioners' trustees had ample reason to investigate further here. The court of appeals' conclusion that ERISA precludes the fund trustees from undertaking the necessary investigation is clearly erroneous.

c. The conclusion that Congress expected employee benefit plan trustees to be able to audit employer records

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auditor to verify the employer's determination of covered persons. American Institute of Certified Public Accountants (AICPA), *Audits of Employee Benefit Plans* §§ 8.4, 10.6 (1983); AICPA, *Audits of Employee Health and Welfare Benefit Funds* 20-21 (1972). These professional auditing procedures reflect an elementary—but critical—auditing principle:

> The auditor should determine that the population [examined] is appropriate for the specific audit objective. For example, an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.

AICPA, *Statement on Auditing Standards No. 39* ¶ 17 (1981).

The court of appeals' suggestion (Pet. App. A29-A30) that petitioners' proposed audit would prove unacceptably expensive is unfounded. Under generally accepted auditing standards, auditors would restrict their initial investigation to a small statistical sample of the total universe of employees. A more extensive sample would be employed only if the initial audit revealed significant problems with the employer's reporting. See AICPA, *Audits of Employee Benefit Plans* §§ 10.5, 10.6. The court of appeals also overlooked the enhancement of plan assets that typically results from meticulous enforcement of employer contribution requirements.

to verify the accuracy of employer identification of covered employees is supported by more narrowly focused provisions of ERISA, as well as by the general fiduciary responsibility section, 29 U.S.C. 1104. For instance, under 29 U.S.C. 1023(c)(1), the annual report required to be filed by the plan administrator with the Secretary of Labor must reflect the number of employees covered by the plan. Congress must have understood that the administrator would have access to the information necessary to determine that figure reliably and independently.

29 U.S.C. 1059 also indicates that such information would be open to the plan fiduciaries. Under Section 1059(a)(1) and (2), an employer participating in a multiemployer plan is required to "furnish to the plan administrator the information necessary for the administrator to maintain" records "with respect to *each* * * * employee[] sufficient to determine the benefits due or which may become due to such employee[]" (emphasis added).[9] Such records plainly would not meet the statutory requirement if limited to persons an employer concedes to be covered. Moreover, Section 1059(a)(1) requires each employer to "furnish to the plan administrator the information necessary" to enable the administrator to render a report "to each employee who is a participant under the plan" stating the extent of his accrued benefits thereunder, whenever such a report is requested or in certain other circumstances. Like Section 1023(c)(1), Section 1059 necessarily assumes that plan fiduciaries will have access to information necessary to enable them correctly to determine the identity of plan participants.

The same is true of 29 U.S.C. 1023(a)(3)(A), which requires that the annual reports of employee benefit plans include the opinion of an independent public accountant as to whether the financial statements required to be contained in the report are presented "in conformity with

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[9] Under ERISA the term "employee" includes all persons employed by the employer. 29 U.S.C. 1002(6).

generally accepted accounting principles." To provide a foundation for rendering an opinion, the independent auditor is to undertake "such tests of the books and records of the plan as are considered necessary" under "generally accepted auditing standards" (*ibid.*). As explained in detail in the amicus curiae brief of Arthur Young & Co. (see also pages 11-12 note 8, *supra*), at least in the case of an audit of a multiemployer fund, generally accepted accounting standards require that employer records be available to confirm the accuracy of coverage determinations and plan funding. More significantly, perhaps, these standards were developed prior to the enactment of ERISA. Thus, Congress must have expected that employer records would be available for independent audit. Because the sufficiency of a plan's internal auditing procedures is an important consideration in its own right in the independent auditor's assessment of the plan's financial statement, Section 1023(a)(3)(A) undercuts the court of appeals' view that Congress did not sanction trustees' exercise of auditing authority with respect to each employer's records.

2. a. Based on the foregoing considerations, we conclude that Congress contemplated that employee benefit plan trustees would have the authority to verify the sufficiency of employer contributions. But even if there were doubt as to whether ERISA itself should be read to *confer* authority upon benefit plan trustees to undertake such audits, the court of appeals' view that provisions of ERISA should be read to *limit* the contractual grant of authority contained in the trust agreements in this case would be wholly untenable. As we have indicated above, verification of an employer's coverage determinations is not inconsistent with either the prudent person standard of care or the statutory requirement of fidelity to the interests of covered persons. In our view, ERISA requires at a minimum that the provisions of a trust agreement that authorize trustees to enforce the contribution obligations of the employer be given a liberal, common-

sense interpretation that will enable the trustees to fulfill their role as guardians of all participants' interests.[10]

b. Examination of the access-to-records provisions of the trust agreement, Article III, Section 5 (see pages 2-3, *supra*), makes clear that the trustees are not limited to examination of records of employees either who are acknowledged by the employer to be covered or who the trustees have reasonable cause to believe have been erroneously excluded. The trust agreement expressly requires the employer to provide the trustees not only with records on covered employees, but also with any other information reasonably required and any pertinent records deemed necessary by the trustees for the proper administration of the trust. In light of the breadth and the structure of the statutory language, and the fact that uncertainty and disputes as to coverage of particular individuals are a fixture of pension plan operation, this language can only be fairly read to authorize the trustees to review employer documents necessary to confirm independently that all contributions due have been made.

In *Schneider Moving & Storage Co.*, the Court read Article III, Section 5 in precisely this manner (slip op. 5 (footnote omitted)):

> To ensure compliance with the contribution requirements, the trust agreements gave the trustees the authority to examine [the employers'] payroll records. If the trustees determined that [the employers] were not complying with their contribution requirements, they had the authority under the trust agreements to initiate legal proceedings to enforce those requirements * * *.[11]

The Court thus indicated that, contrary to the view of the court of appeals in this case, the trustees' audit au-

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[10] The court of appeals' use of ERISA to narrow the authority contractually granted to petitioners' trustees is difficult to reconcile with its own reasoning (see page 5, *supra*) that ERISA looks to the trust agreement to spell out a fiduciary's powers and that ERISA itself accordingly confers no auditing authority on trustees.

[11] See page 3 note 5, *supra*.

thority is available for the purpose of *uncovering* an employer's failure to make required contributions, and not merely to confirm suspected delinquencies.[12]

The court of appeals' decision conflicts with *Schneider Moving & Storage Co.* in another significant respect as well. Contrary to the court of appeals' analysis (see page 7 note 7, *supra*), this Court squarely rejected the premise that petitioners' trustees are obliged to rely upon the union or the arbitration mechanism provided in the collective bargaining agreement to enforce the contribution obligations of participating employers. Slip op. 8-12. To be sure, the court of appeals did not completely subordinate the trustees' enforcement responsibilities to the labor-management arbitral process here. But the court's reasoning that the auditing rights of trustees should be limited so as to defer to that process (see Pet. App. A30-A31) is inconsistent with this Court's recognition (slip op. 11) that the interests of the trustees and the union are not congruent.[13] In any event, the effect

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[12] If auditing authority is limited to suspected delinquencies it does relatively little to complement and support the trustees' acknowledged authority to enforce contribution requirements through legal proceedings. A similar consideration reinforces our statutory analysis. Under 29 U.S.C. 1132 plan fiduciaries are authorized to bring suit to collect delinquent contributions, and may also seek "such * * * equitable relief as the court deems appropriate." Certainly when the trustees have reasonable cause to suspect delinquencies they may file an action under this provision and the district court may direct that an audit be completed. But litigation to collect delinquent contributions may not be commenced without cause to believe that there is "good ground to support it." Fed. R. Civ. P. 11; see *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 24 n.12 (Burger, C.J., dissenting). Section 1132 effectively presumes that plan fiduciaries have means to discover delinquencies that will enable them to avail themselves of an enforcement action.

[13] This Court also recognized in *Schneider Moving & Storage Co.* (slip op. 9) that, in the case of a multiemployer fund, the trustees' exacting enforcement of contribution requirements against each particular employer serves the interests of every other participating employer as well as those of covered employees.

of limiting trustees' authority to cases where a concrete controversy exists as to the coverage of an identified employee is quixotic. So confined, the trustees' audit authority affords no protection to their distinctive interest in uncovering unsuspected delinquencies, while it tends to duplicate the union's role in resolving identified controversies as to particular employees.

3. Further review of the decision in this case is warranted because of the substantial deleterious impact it is likely to have upon administration of employee benefit trust funds and the substantial uncertainty created for fiduciaries as to the scope of their obligations. As indicated above, the decision of the court of appeals sharply restricts the tools available to employee benefit plan fiduciaries to carry out their vital responsibilities. Congress has found that the effective performance of these responsibilities is essential to the "continued well-being and security of millions of employees" (29 U.S.C. 1001 (a); see also 29 U.S.C. 1001a(a)(3)).[14] Moreover, employer delinquencies pose an especially difficult problem for multiemployer pension and benefit funds. See, *e.g.*, 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson). Because of the fluid structure of employment in many industries in which multiemployer benefit plans are typically found, the trustees of such plans have a particularly compelling need for independent means to vertify employers' coverage and contribution determinations. See Bricklayers Fringe Benefit Funds Am. Br. 4-5.

The decision below will exacerbate the fiscal problems that affect multiemployer plans because of employer contribution delinquencies by hindering trustees' efforts to assure that such plans receive all contributions due. Contributing employers, through inadvertence, mistaken legal interpretation or fraud, do not always remit accurate contributions on behalf of all participants. See, *e.g.*, *Jim*

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[14] Approximately half a million persons are participants in or beneficiaries of the petitioner trust funds. *Schneider Moving & Storage Co.*, slip op. 9 n.16.

McNeff, Inc. v. *Todd*, No. 81-2150 (Apr. 27, 1983); *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), petition for cert. pending, No. 83-421; *United States* v. *S & Vee Cartage Co.*, 704 F.2d 914 (6th Cir. 1983), cert. denied, No. 83-228 (Oct. 31, 1983). Nevertheless, pension plans must pay benefits to eligible participants and beneficiaries whether or not the employer has made required contributions to the plan on behalf of the particular employees. *Van Gunten* v. *Central States*, 672 F.2d 586, 589 (6th Cir. 1982); Department of Labor Advisory Opinion No. 76-89 (Aug. 31, 1976) (Pet. App. A70-A71).[15] Accordingly, undetected contribution deficiencies, however caused, can result in underfunding of plans and threaten the interests of those who depend on them.[16]

The decided cases confirm that general payroll audits can facilitate recovery of significant contribution delinquencies undetectable by any other means. See, *e.g.*, *Jim McNeff, Inc.* v. *Todd*, *supra* (audit revealed that employer owed more than $5,000 on behalf of five employees that employer had never reported as covered); *Laborers Health & Welfare Trust Fund* v. *Kaufman & Broad of Northern California, Inc.*, 707 F.2d 412 (9th Cir. 1983) (audit indicated a discrepancy exceeding $130,000 due to

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[15] We know of no support for the court of appeals' speculation (Pet. App. A33-A34) that a covered employee on whose behalf no contributions were made might be estopped from claiming benefits from a plan.

[16] Under Title IV of ERISA, 29 U.S.C. 1301 *et seq.*, Congress created the Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation, to administer a program of insurance to guaranty the payment of certain pension benefits to participants in failed pension plans. Under ERISA and the Multiemployer Pension Plan Amendments of 1980, the program of guarantees was applied in stages to multiemployer pension plans. The court of appeals' decision undermining the efficacy of fiduciary mechanisms for assuring that all required employer contributions are made has the potential to place an added financial burden upon the PBGC insurance program and to impose additional administrative burdens upon the agency. The PBGC has authorized us to report that it concurs in the view that further review is warranted in this case.

controversy regarding covered or uncovered status of particular nonunion labor); *Bugher* v. *Consolidated X-Ray Service Corp.*, *supra* (audit uncovered more than $100,000 due on behalf of covered employees who employer erroneously believed were not covered); *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981) (audit revealed deficiency of more than $25,000 due to employers' failure to contribute on behalf of nonunion covered employees).

The decision of the court of appeals, however, will encourage employer resistance to audits. Trustees who lack a clearly-enunciated right to audit general payroll records must depend on the employer voluntarily to provide the information needed to assure that contributions are being made for all eligible employees. The decision below thus will frustrate the efforts of plan trustees to fulfill their fiduciary duties, create confusion as to the extent of their obligations, and breed litigation. The decision may also discourage trustees from exercising the utmost diligence in protecting the interests of all persons entitled to benefits under employer benefit plans.[17]

Because of the broad adverse consequences of the court of appeals' decision, the judgment of the court of appeals should not stand unreviewed. Plenary consideration may be appropriate at this time. Because the court of appeals' analysis conflicts in several respects with *Schneider Moving & Storage Co.*, however, the Court may wish to consider vacating the judgment of the court of appeals and remanding the case for further proceedings in that court.[18]

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[17] The decision thus would place greater burdens on the Secretary of Labor, who is authorized to investigate "whether any person has violated or is about to violate" any provision of ERISA (29 U.S.C. 1134(a)). Congress surely did not intend that the Secretary's investigative authority be the exclusive instrument for verifying the completeness of employer contributions, for it expressly withheld from the Secretary authority to bring suit to collect delinquent employer contributions to a multiemployer plan. See 29 U.S.C. 1132(b)(2) and 1145.

[18] The court of appeals' decision on the contractual issue rested in part upon *Central States, Southeast & Southwest Areas Pension*

CONCLUSION

The petition for a writ of certiorari should be granted. In lieu of plenary consideration at this time, the Court may prefer to vacate the judgment of the court of appeals and remand the case for reconsideration in light of *Schneider Moving & Storage Co.*

Respectfully submitted.

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Fund v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981). See Pet. App. A26. Subsequent to the court of appeals' decision in this case, the Eighth Circuit, sitting en banc, rejected the premise of *CRST* that disputes as to whether an employee is covered under a benefit plan must be resolved through labor-management arbitration. *Robbins* v. *Prosser's Moving & Storage Co.*, 700 F.2d 433 (1983). This Court in turn affirmed that decision in *Schneider Moving & Storage Co., supra.* While the Eighth Circuit in *Robbins* did not expressly disavow its earlier ruling interpreting Article III, Section 5 of the trust agreement, its analysis suggests that it would not adhere to that view. See 700 F.2d at 442. We note that *Bugher* v. *Consolidated X-Ray Service Corp., supra*, which treats an employer's failure to cooperate with an audit as bad faith conduct warranting an award of attorney's fees (705 F.2d at 1436-1437), also appears to be inconsistent with the decision below.

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